IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1737 OF 2004

Edwin Francis Britto)
Indian National and Citizen)
residing at 106, Jo-Tess House)
Old Khar Vilage, Khar (West))
Mumbai - 400 052.).. Petitioner

Versus

1. Municipal Corporation of)
Greater Mumbai, a statutory)
corporation, through its)
Legal Department, having its)
office at Municipal Head)
Office, Annexe Building,)
Mahapalika Marg, Fort,)
Mumbai 400 051.)

2. The Additional Municipal)
Commissioner (Western Suburbs))
having his office at)
Municipal Head Office,)
3rd floor, Mahapalika Marg,)
Fort, Mumbai 400 001.)

3. Prakash Pandurang Bobadi,)
Municipal Councillor Ward)
No.75, residing at 245,)
Warin Pada, Khar Danda,)
Khar (West),)
Mumbai - 400 052.)..Respondents

Mr. Raju Z. More i/b. V.S.Talkute for the Petitioner.

Mr. A.Y.Sakhare with Mr. Vinod Mahadik for Respondent No.1.

Mr. S.I. Menon for Respondent No.3.

CORAM: D.K.DESHMUKH,J.

DATE : 9th August,2006.

ORAL JUDGMENT :

1. By this Petition, the Petitioner challenges the order passed by the Additional Municipal Commissioner, Western Suburbs of the Mumbai Municipal Corporation dated 8th January, 2004. By that order, the Additional Municipal Commissioner, Respondent No.2 in this Petition, has held that the Respondent No.3 is not disqualified to be a Councillor of the Respondent No.1, the Municipal Corporation because of the provisions of Section 16(1D) of the Mumbai Municipal Corporation Act, 1888 (hereinafter referred to as "the Act"). The facts that are material and relevant for deciding this Petition are as under :-

. That the Petitioner filed Writ Petition No.1275 of 2003 in this Court. By that Petition, the Petitioner sought direction to the Respondent no.1 - Municipal Corporation to evolve a procedure to enable the aggrieved person to approach the designated competent authority with complaint against councillors who are disqualified to be councillor under Section 16(1D) of the Act. It may be pointed out that Section 16(1D) of the Act incorporates a provision for disqualifying a person from being a Councillor of the Respondent No.1 - Municipal Corporation if such Councillor has constructed any illegal structure. The Respondent No.3 was also a party to that Petition. It appears that the Respondent No.3 was elected as a Councillor of the Respondent No.1 - Corporation on 12th February, 2002. Before his election as a Councillor, the Respondent No.1 had issued a notice dated 24th May, 2001 to the Respondent No.3 under Section 351 of the Act stating therein that the Respondent No.3 has erected the constructions without the permission of the competent authority and, therefore, he was called upon to remove that construction. He was also told that if he fails to remove the construction within the time allowed, then the Corporation shall do the same. After receiving the notice, the Respondent No.3 addressed a letter

dated 30th May, 2001 stating therein that the construction to which the notice relates is occupied by him as a tenant for the last 70 to 80 years and that the construction was in existence prior to 1962 and that the gallery is very old and the repairs to the same has been carried out 10 to 15 years back. He stated that the notice has been issued by the Corporation to him because some anti-social elements have complained against him.

2. The Assistant Municipal Commissioner made final order after considering the explanation given by the Respondent No.3 on 18th January, 2003 stating therein that the explanation given by the Respondent No.3 is not satisfactory. In the order, reasons were given why the explanation is not found satisfactory and the Respondent No.3 was called upon to demolish the unauthorised work. The order was not challenged by the Respondent No.3. It appears that thereafter the Respondent No.3 issued a notice to the Municipal Corporation through a lawyer. In that notice, a grievance was made about the final order dated 18th January, 2003. In that notice, it was stated by the Respondent No.3 that the building was owned by one Mr. Madan Kundecha. After receiving the notice, it appears that the Corporation sent a communication dated 28th February, 2003 to the said Madan Kundecha

asking him to produce authorisation for raising the construction. That letter, it appears, was replied by Madan Kundecha by his communication dated 23rd June, 2003.

3. In the Writ Petition filed by the Petitioner, the entire correspondence referred to above, was produced. After hearing all the parties involved, the Division Bench of this Court by order dated 19th November, 2003, disposed of that Petition. By para 2 of the order, the Respondent No.2 - Additional Municipal Commissioner was directed to decide the question of disqualification of the Respondent No.3 under Section 16(1D) of the Act. The Deputy Municipal Commissioner was directed to demolish the unauthorised structure in respect of which final orders were passed on 18th January 2003. The order passed by the Division Bench has also not been challenged by the Respondent No.3.

4. Pursuant to the order passed by this Court, the Respondent No.2 heard the parties and passed the order dated 8.11.2004. The Respondent No.2 has come to the conclusion that the Respondent No.3 was not the owner of the property and that he was a tenant there. It is held that the construction which was alleged to have been unauthorisedly erected was erected before election of the Respondent No.3 as a Councillor. It

is further held that Section 16(1D) of the Act operates and disqualifies a person for being a Councillor if the unauthorised structure is erected by him after his election as a Councillor. In the present Petition, the Petitioner has challenged

this order

5. Learned Counsel appearing for the Petitioner submits that the Division Bench of this Court had directed the Corporation to demolish the construction in terms of the final order dated 18th January, 2003. Therefore, the order dated 18th January, 2003 had become final between the parties. The order dated 18th January, 2003 clearly held that the Respondent No.3 was responsible for raising unauthorised structure and, therefore, it was not permissible for the Respondent No.2 to go behind the order passed by the Division Bench of this Court and hold a fresh enquiry as to whether the Respondent No.3 was responsible for raising unauthorised structure. The question whether the Respondent No.3 was responsible for raising the unauthorised structure was not open to be decided by the Respondent No.2 as that question is decided by the order of the Division Bench dated 19th November, 2003 inasmuch as the Division Bench directed demolition of the construction pursuant to the final

order dated 18th January, 2003. Had the said matter not been finally determined by that order, according to the learned Counsel, the Division Bench would not have directed demolition of the construction. The learned Counsel further submits that the Respondent

No.2 has committed an error in construing the provisions of Section 16(1D) of the Act. According to him, Section 16(1D) operates and disqualifies a person from being a Councillor if he has, at any point of time, raised an unauthorised construction.

6. The learned Counsel appearing for the Respondent No.3, on the other hand, submits that for the purpose of deciding whether the Respondent NO.3 has incurred disqualification under Section 16(1D), it was necessary for the Respondent No.2 to decide whether Respondent No.3 has raised any illegal construction. The Respondent No.3 by notice addressed to the Corporation, had pointed out that he was merely a tenant and was not the owner of the structure. Pursuant to that notice, the Corporation had issued a notice to the landlord and owner of the structure, who had submitted his reply to the Corporation. Therefore, the question whether the Respondent No.3 was responsible for raising unauthorised structure or not was not finally decided as that question was under

consideration of the Corporation as is indicated by the letter dated 28th February, 2003 addressed by the Assistant municipal Corporation to Madan Kundecha. The learned Counsel further submits that the construction placed on the provisions of Section 16(1D) by the Respondent No.3 is also proper. According to the learned Counsel, merely because in the past, a person has erected unauthorised structure, he cannot be disqualified from being a Councillor for all the time to come. Learned Counsel also tried to refer to some discussions that according to him took place between the Counsel appearing for the Respondent No.3 and the Division Bench. But I did not permit the learned Counsel to refer to that discussion. In my opinion, that is impermissible in view of the Judgments of the Supreme Court in the case of Surendra Singh and Ors. vs. State of U.P. (AIR 1954 SC 194) and Messrs Associated Tubewells Ltd. vs. R.B.Gujarmal Modi (AIR 1957 SC 742) and a Judgment of the Division Bench of this Court in the case of A.T.K.S. Sanstha vs. State of Maharahstra (1977 Mah.L.J.508).

7. The learned Counsel appearing for the Respondents Nos. 1 and 2 addressed me on the construction to be placed on the provisions of Section 16(1D) of the Act. The learned Counsel submits that the provisions of

Section 16(1D) have to be read with the provisions of Section 16(1B) and Section 16(1C) of the Act because all these three provisions have been brought on the Statute Book by the same Act of the State Legislature. The learned Counsel submits that if the disqualification under Section 16(1D) is said to operate on raising an illegal construction in the past, then the person who raises the illegal structure will be disqualified throughout his life to contest election as a Councillor. According to the learned Counsel, therefore, the construction placed by the Respondent No.2 on the provisions of Section 16(1D) is proper. It is submitted that while deciding the question whether the Respondent No.3 has incurred disqualification under Section 16(1D) of the Act or not whether it was open to the Respondent No.2 to again go into the question whether the Respondent No.3 has erected illegal structure.

8. Now, from the rival submissions it is clear that, the first question that is to be considered is, whether, in view of the Judgment of the Division Bench, it was possible for the Respondent No.2 to go into the question whether the Respondent No.3 has raised any illegal structure or not ? In that regard, first reference has to be made to the notice that was issued before the order dated 18th January,2003 was

made by the Corporation. That notice is dated 24th May, 2001 and was issued to the Respondent No.3 alone and in that notice, a clear allegation was made against the Respondent No.3 that he has erected an unauthorised structure and he was called upon to demolish the same. He submitted his reply by letter dated 30th May, 2001. In that reply, he had raised two defences (1) that he was merely a tenant of the premises and was not the owner and (2) that the construction has been raised long back. After considering both these defences, the Corporation made the final order dated 18th January, 2003. In that order issued to the Respondent No.3 the Corporation has stated that the explanation submitted by him after receiving the notice under Section 351 has been considered by the Corporation and it has been found to be unsatisfactory and, therefore, he was directed to demolish the structure within 15 days. If according to the Respondent No.3, this order dated 18th January 2003 was illegal, it was open for the Respondent no.3 to challenge that order in accordance with law either before any appropriate authority or competent Court. The Respondent No.3 chose not to do that. Instead, he through a lawyer, issued notice to the Corporation. After that notice was received by the Corporation, the Corporation addressed a letter to the person named in that notice describing him as a landlord and asking

him to produce certain documents. The person who is described as a landlord by the Respondent No.3 submitted reply dated 23rd June, 2003. There is no order placed on record made by the Corporation after the explanation was submitted by him. At this stage, it would be appropriate to refer to the provisions of Section 351 of the Act. It read as under :-

> "351. Proceedings to be taken in respect of buildings or work commenced contrary to section 347 - (1) If the erection of any building or the execution of any such work as is described in section 342, is commenced contrary to the provisions of section 342 or 347, the Commissioner, unless he deems it necessary to take proceedings in respect of such building or work under section 354, shall - (a) by written notice, require the person who is erecting such building or executing such work, or has erected such building or executed such work, or who is the owner for the time being of such building or work, within seven days from the date of service of such notice, by a statement in writing subscribed by him or by an agent duly authorized by him in that behalf and addressed to the Commissioner, to show sufficient cause why such building or work shall not be removed,

altered or pulled down; or

(b) shall require the said person on such day and at such time and place as shall be specified in such notice to attend personally, or by an agent duly authorized by him in that behalf, and show sufficient cause why such building or work shall not be removed, altered or pulled down.

[Explanation - "To show sufficient cause" in this sub-section shall mean to prove that the work mentioned in the said notice is carried out in accordance with the provisions of section 337 or 342 and section 347 of the act]

(2) If such person shall fail to show sufficient cause, to the satisfaction of the Commissioner, why such building or work shall not be removed, altered or pulled down, the Commissioner may remove, alter or pull down the building or work and the expenses thereof shall be paid by the said person. In case of removal or pulling down of the building or the work by the Commissioner, the debris of such building or work together with one building material, if any, at the sight of the construction, belonging to such person, shall be seized and disposed of in the prescribed

manner and after deducting from the receipts of such sale or disposal, the expenditure incurred for removal and sale of such debris and material, the surplus of the receipt shall be returned by the Commissioner, to the person concerned.

(3) No Court, shall stay the proceeding of any public notice including notice for eviction, demolition or removal from any land or property belonging to the State Government or the Corporation or any other local authority or any land which is required for any public project or civil amenities, without first giving the Commissioner a reasonable opportunity of representing in the matter."

Perusal of the provisions of Section 351 of the Act shows that a show cause notice is to be issued to the person who according to the Corporation has erected an unauthorised structure, explanation, if any, submitted by the person to whom the show cause notice has been issued has to be considered and then an order is to be made. It is clear from the record that the notice dated 24.5.2001 was issued by the Corporation, it was addressed to the Respondent No.3, an allegation was made that he has erected an unauthorised structure and therefore he was called upon to submit his

explanation. The Respondent No.3 submitted his explanation dated 30.5.2001 to the show cause notice. After consider the explanation, the Corporation made the order dated 18.1.2003, directing the Respondent No.3 to demolish the unauthorised structure. It is settled law that if a person is aggrieved by an order made under Section 351 of the Act, his remedy is to challenge that order by filing a suit within six months of the order otherwise the order becomes final. Instead of challenging the order, the Respondent NO.3 issued notice to the Corporation. It is nobody's case that subsequently the Corporation modified or cancelled the order made by it under Section 351 of the Act. It is in this background that the Division Bench decided the Writ Petition No.1275 of 2003 by order dated 19th November, 2003.

9. Para 4 of the order of the Division Bench is crucial. It reads as under :-

> "4. The concerned Deputy Municipal Commissioner and/or Ward Officer is directed to take steps for demolition of the unauthorized structures in respect of which final orders have been passed on 18th January 2003 and carry out demolition in respect of offending

structure within a period of eight weeks from today."

It is clear from what is stated above that when the Division Bench passed the order dated 19th November, 2003, it had before it the order dated 18th January, 2003 whereby the Corporation directed the Respondent no.3 to demolish the unauthorised structure. The Division Bench also had before it the communication dated 28th February, 2003 which was addressed to the alleged landlord, Mr. Madan Kundecha. Still, the Division Bench directed demolition pursuant to the final order dated 18th January, 2003. By the date the Division Bench decided the Petition i.e. 19.11.2003, the order dated 18.11.2003 had become final as the period of limitation for challenging that order was over and that order was also not modified or cancelled by Corporation though notice was issued to the alleged landlord and therefore, the Division Bench directed demolition of the unauthorised structure pursuant to the order dated 18th January, 2003. What is pertinent to note is that the Respondent No.3 has not challenged the order passed by the Division Bench which had directed demolition to be carried out pursuant to the final order dated 18th January, 2003. That order contemplated demolition of the structure which was unauthorisedly erected by the Respondent no.3. The

order of the Division Bench dated 19th November, 2003 has become final and,therefore, the question as to who erected the structure could not have been decided by the Respondent No.2 afresh as it was concluded between the parties by the order of the Division Bench dated 19th November, 2003. The only question to be decided by the Respondent No.2 was whether having been found responsible for raising unauthorised structure before his election as a Councillor in view of the provisions of Section 16(1D) of the Act, the Respondent No.3 can be removed from office.

10. Now, it is necessary, therefore, to consider the provisions of Section 16(1D) of the Act. It reads as under :-

> "16(1D) A Councillor shall be disqualified for being a Councillor, if such Councillor has constructed or constructs by himself, his spouse or his dependent, any illegal or unauthorised structure violating the provisions of this Act or the Maharashtra Regional and Town Planning Act, 1966 or the rules or bye-laws framed under the said Acts; and has directly or indirectly been responsible for, or helped in his

> capacity as such Councillor, in carrying out such illegal or unauthorised construction or has by written communication or physically, obstructed or tried to obstruct any Competent Authority from discharging its official duty in demolishing any illegal or unauthorised structure. Such disqualification shall be for the reminder of his term as a Councillor from the date of the declaration of such structure to be illegal or unauthorised by the concerned authority under the provisions of the said Act or, as the case may be, from the date of commission of the act of interference or obstruction by the Councillor against the Competent Authority."

Perusal of the above quoted provisions shows that if a councillor has erected an unauthorised structure, then he cannot be a councillor. It is submitted that, if an unauthorised structure is erected by a Councillor after his election, then only the provision disqualifies him to be a councillor. If this construction is accepted, the words "has constructed" become meaningless. Use of the phrase "has

constructed" signifies that the intention of the legislature was to disqualify from holding the office of Councillor such person who has erected unauthorised structure in the past when he was not a Councillor. The intention appears to be to avoid likelihood of conflict between duty and interest. The person who has erected unauthorised structure before his election as Councillor would not be interested in removal of unauthorised structures and, therefore, the view of the legislature appears to be to discourage election of persons who are responsible for raising unauthorised structures. Perusal of the provisions of Section 16(1D) further shows that when the legislature wanted the capacity as a Councillor to be relevant the legislative provision has clearly indicated that. Insofar as the structure which is not erected by the person himself, but in relation to which he has merely helped, that help should be in his capacity as a Councillor. So far as raising of structure is concerned, the raising of unauthorised structure by him or his family need not be after his election. Even if an illegal structure is raised by the person before his election, on being found that he was responsible for raising the unauthorised structure, he can be disqualified from being a Councillor. I have perused the provisions of Section 16(1B) and 16(1C) They were added by the same Act of the State

Legislature which added Section 16(1D) and they all relate to disqualification of a Councillor, but those provisions are of different nature and are not relevant for construing the provisions of Section 16(1D). In my opinion, therefore, the disqualification under the provisions of Section 16(1D) will operate even if the Councillor had erected unauthorised structure even before his election as a Councillor. In enacting the provisions of Section 16(1D) of the Act, the intention of legislature was to enable the Corporation to effectively tackle the growing menace of illegal construction. One of the mandatory duties of the Corporation as local body and as a planning authority is to prevent erection of unauthorised structures and to demolish unauthorised structures. If a person who himself has erected an unauthorised structure is elected a Councillor, there is likelihood of there being conflict between duty of such a person as a Councillor and his interest in retaining the unauthorised structure. Therefore, the legislature in order to prevent such a person being elected as a Councillor has used the words "has constructed" in Section 16(1D) of the Act. It is pertinent to note here that in the Reply affidavit filed by the Respondent No.3, there is no challenge raised to the Constitutional validity of the provisions. Therefore, there is no question of this

Court making an attempt to read down the provisions. The provision will have to be given its full meaning. If that is done, a person who has erected any unauthorised structure at any time is disqualified to be a Councillor. As observed above, as a result of the order of the Division Bench, it is an established fact that the Respondent No.3 has erected an unauthorised structure.

11. In the result, therefore, the present Petition succeeds and is allowed. The order dated 18th January, 2003 passed by the Respondent No.2 is set aside. I find that the Respondent No.3 is disqualified to be a Councillor because of Section 16(1D) of the Act. In view of the provisions of Section 17, he ceases to be a Councillor of the Respondent No.1 - Corporation.

. Rule is made absolute accordingly. No order as to costs.

12. On a motion made by the learned Counsel appearing for Respondent No.3, the operation of this Order is stayed for a period of eight weeks, subject to the condition that the Respondent No.3 shall not function as a Councillor of the Respondent No.1 Corporation, save and except that he would be entitled to attend

meetings of the Respondent No.1 Corporation, but he shall not vote or claim any allowance or remuneration for attending those meetings.

Certified copy expedited.

(D.K.DESHMUKH,J.)